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Evidence--Inconsistent Statements (United States v. Haggett)

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As the court itself indicated, this decision is of significant precedential value.[16] It is, however, difficult to comprehend why a right as basic to our system as this has not previously been subject to judicial scrutiny.[17] Hopefully, there will now be more meaningful participation in the trial by those indigent defendants with a language barrier.

EVIDENCE — INCONSISTENT STATEMENTS

Within the realm of evidentiary procedure lies the problem of the propriety of introducing extrinsic evidence to impeach the credibility of a given witness. In determining the admissibility of such evidence the court initially must decide whether the evidence is of a collateral[18] nature, for if this be the case, no evidence may be admitted thereon.[19] It was with this determination in mind that the Court of Appeals for the Second Circuit in *United States v. Lester*,[20] decided that the "mo-

that defendant's failure to object at trial was not detrimental, because he had not waived a right which was not known to exist. 434 F.2d at 390. *See generally* Illinois v. Allen, 397 U.S. 337 (1970); Johnson v. Zerbst, 304 U.S. 458 (1938). Such an argument would also indicate full retrospective and prospective application. *See also* United States v. Liguori, 430 F.2d 842 (2d Cir. 1970); Van Alstyne, *In* Gideon's *Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

16 434 F.2d at 387.

17 Full time interpretation is provided by the Government for those who require such in the district court of Puerto Rico. *See* JUD. CONF. REP. 59 (1966).

18 If it be asked what "collateral" means, we are obliged either to define it further, . . . in which case it is a mere epithet, not a legal test, . . . or to illustrate by specific examples . . . in which case we are left to the idiosyncrasies of individual opinion upon each instance."

3A J. WIGMORE, WIGMORE ON EVIDENCE § 1003 (Chadbourne Rev. 1970) [hereinafter WIGMORE]. The only apparent authoritative test is that laid down in Attorney General v. Hitchcock, 1 Exch. 91, 154 Eng. Rep. 38 (1847), asking whether facts predicating a prior contradiction may be introduced for purposes independent of that contradiction. As for United States jurisdictions accepting this test see WIGMORE, § 1021 n.1. While it may be somewhat difficult to determine whether a matter is, or is not "collateral," Wigmore provides us with a classification of facts not collateral. WIGMORE §§ 1004-1005.

19 *See* United States v. Williamson, 424 F.2d 353 (5th Cir. 1970); Head v. Halliburton Oilwell Cementing Co., 370 F.2d 545 (5th Cir. 1966). For a look at what is, and what is not "collateral" matter, *see* note 20 *infra*. *See also* WIGMORE §§ 1004-05 for a test of whether a matter is collateral.

20 248 F.2d 329 (2d Cir. 1957). The court here realized the impropriety of attack on collateral matters and thus noted that:

> although a party may not cross examine a witness on collateral matters in order to show that he is generally unworthy of belief, and may not introduce extrinsic evidence for that purpose . . . a party is not so limited in showing that the witness had a *motive* to falsify the testimony he has given.

Id. at 334 (emphasis added).

The proposition that bias, interest, or hostility of a witness is never collateral matter has been uniformly upheld. See United States v. Battaglia 394 F.2d 304 (7th Cir. 1968), *rehearing denied*, 394 F.2d 327, *vacated*, 394 U.S. 310 (1969), *aff'd on rehearing*, 432 F.2d 1115 (1970); Barnard v. United States 342 F.2d 309 (9th Cir.) *cert. denied*, 382 U.S. 948 (1965); United States v. Haggett, 438 F.2d 396 (2d Cir. 1971); Tinker v. United States, 417 F.2d 542 (D.C. Cir. 1969); Majestic v. Louisville & N.R. Co., 147 F.2d 621 (6th Cir. 1945). *See generally* WIGMORE §§ 948-950; J. PRINCE, RICHARDSON ON EVIDENCE § 503 (9th ed. 1964) [hereinafter RICHARDSON]. Courts have held that testimonial motivation

tive" of a witness is not a collateral matter and may be shown by extrinsic evidence. While a party may always undertake to demonstrate bias or testimonial motivation of a witness, the extent of such proof is left to the discretion of the trial court.[21] This discretionary power of the court has been cited as abusive in several cases,[22] resulting in reversals in many instances.[23]

A witness may be impeached by showing prior statements which

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was catalyzed by various interests of the witness. For cases involving a witness' motivation based on the *possibility* of obtaining leniency in an action pending against him, see Gordon v. United States, 344 U.S. 414 (1953); Hughes v. United States, 427 F.2d 66 (9th Cir. 1970); United States v. Campbell, 426 F.2d 547 (2d Cir. 1970); Grant v. United States, 368 F.2d 658 (5th Cir. 1966); United States v. Hogan, 232 F.2d 905 (3d Cir. 1956). See also United States v. Haggett, 438 F.2d 396 (2d Cir. 1971), involving witness' hostility towards the defendant.

> Suffice it to say that
> extrinsic testimony, or that elicited by cross examination to show the bias or interest of a witness in a cause, covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite.

Majestic v. Louisville & N.R. Co., 147 F.2d 621, 627 (6th Cir. 1945).

21 *See* Tinker v. United States, 417 F.2d 542 (D.C. Cir. 1969). *See also* Nutter v. United States, 412 F.2d 178 (9th Cir. 1969), wherein it was felt that the discretion of the trial court is wide as to how and when bias may be proved and what collateral evidence is material. This maxim regarding court discretion seems to prevail in most jurisdictions. *Accord*, Rosado v. United States, 370 F.2d 542 (9th Cir. 1966), *cert. denied*, 386 U.S. 1010 (1967); Sykes v. United States, 373 F.2d 607 (5th Cir. 1966), *cert. denied*, 386 U.S. 977 (1967). The question of proper use of court discretion is raised quite often on appeal and is usually appellant's major argument. For a look at state decisions in this area see RICHARDSON § 516.

22 *See* United States v. Campbell, 426 F.2d 547 (2d Cir. 1970) wherein the court enunciated a standard whereby a determination as to abuse of court discretion could be adjudged. The court stated that:

> [i]n determining whether the trial judge has abused his discretion in limiting the introduction of such evidence, the issue is whether the jury was otherwise in possession of sufficient information concerning formative events to make a discriminating appraisal.

Id. at 550.

Accord, Gordon v. United States, 344 U.S. 414 (1953). The Court in *Gordon*, while recognizing the principle of allowing trial courts wide latitude in their discretion, nevertheless, was quick to assert that such a "principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." 344 U.S. at 423. For cases on the state level *see* RICHARDSON § 516.

23 *See* Gordon v. United States, 344 U.S. 414 (1953), wherein the Court held as abusive the trial court's denial of a motion to produce documentary evidence which would have allegedly shown contradictory statements of a prosecution's witness. The Court's ruling was based on the fact that:

> [f]or production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen. . . .

344 U.S. at 420.

For New York State court decisions holding that the trial court has no discretionary power to rule out all of the evidence which is offered for the purpose of proving the hostility of a witness, see People v. McDowell, 9 N.Y.2d 12, 172 N.E.2d 279, 210 N.Y.S.2d 514 (1961); People v. Lustig, 206 N.Y. 162, 99 N.E. 183 (1912); People v. Capuano, 15 App. Div. 2d 400, 225 N.Y.S.2d 252 (1962).

are inconsistent with those made at trial.[24] However, in attempting to introduce such prior statements, counsel must first lay a proper foundation by asking the witness sought to be impeached if he made such inconsistent statements.[25]

Following this guideline, the United States Court of Appeals for the Second Circuit has consistently[26] declared inconsistent statements to be admissible in order to discredit a witness' testimony. The most recent of such decisions was *United States v. Haggett*,[27] wherein the

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24 By introducing prior statements of a witness which are inconsistent with those made at the trial, the counsel is seeking to impeach the witness' credibility and thereby discredit his testimony. RICHARDSON § 513. This use of such statements as a basis for impeachment is common to most jurisdictions. *See generally* Grunewald v. United States, 353 U.S. 391 (1957); United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970); United States v. Classen, 424 F.2d 494 (6th Cir. 1970); Benson v. United States, 402 F.2d 576 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); United States v. Barnes, 319 F.2d 29 (6th Cir. 1963). For a particularly intriguing situation involving the use of prior inconsistent statements *see* Harris v. New York, 401 U.S. 222 (1971) wherein the Court voted 5 to 4 in holding that statements which were inadmissible against the defendant in the prosecution's case because of failure to give *Miranda* warnings, were properly admissible to attack the credibility of defendant's trial testimony.

It is generally accepted that a jury is to consider inconsistent statements only as they relate to the witness' credibility and not for their value as substantive evidence. For a general discussion of this "rule" and the criticism against it see note 30 *infra*.

25 As in all areas of evidence, a party may not proceed on cross-examination until a proper foundation has been laid. Similarly, a party must lay a proper foundation for introducing inconsistent statements by first asking the witness if he has made such prior statements. *See* RICHARDSON § 514 and state decisions cited therein. For cases in the Second Circuit mentioning this well-known point *see* United States v. Haggett, 438 F.2d 396 (2d Cir. 1971); United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968). *See also* Gordon v. United States, 344 U.S. 414, 418 (1953) where the Court made mention of the defense counsel's properly laying a foundation for the introduction of proposed evidence.

26 The term "consistently" is not meant in its absolute, rigid sense. An analysis of the cases in the Second Circuit tends to support the textual statement: *see* United States v. Mingoia, 424 F.2d 710 (2d Cir. 1970); United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968), *cert. denied*, 393 U.S. 961, *rehearing denied*, 393 U.S. 1045 (1969); United States v. Mahler, 363 F.2d 673 (2d Cir. 1966); NLRB v. Quest-Shon Mark Brassiere Co., 185 F.2d 285 (2d Cir. 1950), *cert. denied*, 342 U.S. 812 (1951). It should be noted that the court's "consistency" was somewhat modified in United States v. DeSisto, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), wherein the court allowed such statements to be admitted, not for the essential purpose of impeachment, but rather as substantive evidence. For a full discussion of this case and the applicability of inconsistent statements in regard to substantive evidence *see* note 30 *infra*. As to other jurisdictions declaring prior inconsistent statements admissible see note 24 *supra*.

27 438 F.2d 396 (2d Cir. 1971). The defendant was convicted of misapplying funds of a federally insured bank and of conspiring to misapply such funds. On appeal, defendant argued that the evidence of prior statements of the key prosecution witness, inconsistent with his in-court testimony, were improperly excluded by the trial court judge. The statements sought to be admitted by the defense would have alleged that the witness attempted to suborn perjury of three other witnesses so as to insure conviction of defendant. Other statements allegedly would have shown the witness' hostility towards the defendant.

The introduction of these inconsistent and hostile statements would have tended to show a motive for the witness' false testimony and thus been a basis for impeaching the witness and discrediting his testimony.

court cited persuasive authority[28] in support of admitting such evidence. The court was quick to point out that there is "no litmus test method to determine whether extrinsic evidence should be admitted to prove that a witness had a motive to testify falsely. . . ."[29] There is however, a general rule[30] regarding the consideration such inconsistent statements are to be given if they are indeed admitted into evidence.

United States v. Haggett is not a revelation, but rather a standard bearer of decisional law in the Second Circuit. In protecting a defendant from prejudicial attack by self-motivated, biased prosecution testimony, the decision epitomizes the concept of stare decisi.

When prejudicial testimony is given, counsel should be allowed

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28 438 F.2d at 399-400. The court mentions the established principle that

> once a proper foundation has been laid, a party should be permitted to discredit the testimony of one of his adversary witnesses by showing that on other occasions that witness has made statements inconsistent with his trial testimony.

Id. at 399. The foundation to which the court refers was laid when, on cross-examination, the witness "responded negatively to defense counsel's inquiry as to whether he had attempted to suborn perjury of the other witnesses." *Id.* at 398. For a look at the admissibility of inconsistent statements *see* RICHARDSON 513-514. *Compare* United States v. Haggett, 438 F.2d 396 (2d Cir. 1971) *with* Beavers & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309 (1970).

29 438 F.2d at 399. The court further stated that although there is no rigid test to determine the admissibility of evidence, nevertheless,

> a defendant should be afforded the opportunity to present facts which, if believed, could lead to the conclusion that a witness who has testified against him either favored the prosecution or was hostile to the defendant.

Id.

30 This general rule holds that such inconsistent statements whether shown by extrinsic evidence, or used on cross-examination, may not be considered by the jury as substantive evidence of the truth of their contents but go only to the credibility of the witness' in-court testimony. Carter v. United States, 417 F.2d 384 (9th Cir. 1969); *See also* Grunewald v. United States, 353 U.S. 391 (1957); United States v. Classen, 424 F.2d 494 (6th Cir. 1970); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); Byrd v. United States, 342 F.2d 939 (D.C. Cir. 1965). 2 JONES, EVIDENCE § 271 (5th ed. 1958). The justification most often advanced in favor of the rule is that such statements are hearsay, in that they were made by an unsworn, out of court declarant, and were not subject to the immediate application of the testing process,—cross-examination—when made. Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309, 312 (1970). For sharp criticism of this rule which limits the use of inconsistent statements so as not to be admitted as substantive evidence, *see* United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964) citing numerous authorities holding the rule to be "pious fraud, artificial, basically misguided, mere verbal ritual, and an anachronism that still impedes our pursuit of truth." It is necessary to distingush *DeSisto* from *Haggett* in that the former concerned prior statements made in court at a previous trial, whereas the latter case concerns prior statements made out of court to a third person. The practicality of this rule seems dubious in that

> jurors would almost inevitably, regardless of instruction to the contrary, act upon the assumption that what a witness may have said soon after an event is far more likely to be accurate than what the witness might subsequently say, even in court under oath.

Asaro v. Parisi, 297 F.2d 859, 864 (5th Cir.) *cert. denied*, 370 U.S. 904 (1962). For a provocative discussion of this rule *see* Beaver & Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309 (1970).

to impeach the credibility of the witness by introducing statements which are inconsistent with some material part of his present testimony.[31] Without such evidence, the venom of prejudice will be instrumental in directing the course of justice.

PROCEDURAL DUE PROCESS IN PENO-CORRECTIONAL LAW

Rights of the Convicted. In the 1970 term, the Court of Appeals for the Second Circuit decided three important cases which concerned the rights of convicts within the peno-correctional system. In *Sostre v. McGinnis*,[32] the court, sitting en banc,[33] considered the extent to which the federal constitutional rights are retained by one incarcerated in a state penitentary. At issue was the use of prolonged punitive segregation[34] for questionable reasons as a disciplinary device against a state prisoner. The court held, first, that the plaintiff's prolonged segregated confinement was not such cruel and unusual punishment as to violate the prohibition of the eighth amendment;[35] second, that the imposition of punitive segregation upon the plaintiff merely on account of his "political beliefs and legal activities" is prohibited by the Federal Bill of Rights; third, that although they may open and inspect all incoming and outgoing mail of prisoners, prison officials may not censor or refuse to mail or deliver any correspondence between a prisoner and a court, a public agency or an official, or any lawyer, if the correspondence concerns his case or his relation to the correctional facility; fourth, that the Constitution prohibits subjection of prisoners to the arbitrary and capricious actions of prison officials; and fifth, that the damage award against the State Commissioner of Corrections was improper.

The plaintiff, Martin Sostre, was serving a thirty to forty-year prison sentence at Green Haven Correctional Facility in New York

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31 *See* note 24 *supra*.

32 442 F.2d 178 (2d Cir. 1977). A petition for rehearing was filed on March 25, 1971 and was denied on April 8, 1971. Therein, the plaintiff's attorneys said that they ". . . fully intend to raise all the issues on which the district court was reversed in a higher forum." Plaintiff's Petition for Rehearing at 2 n.1. For discussion of this procedure, see Introduction, *supra*. On March 6, 1972, the United States Supreme Court rejected appeals by both sides. 166 N.Y.L.J. 45, March 7, 1972, at 1, col. 6.

33 In light of the fact that neither the Supreme Court nor the Second Circuit had previously considered the implications of prisoner's rights as raised in the district court, *e.g.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), the issues were considered important enough to necessitate a decision by the entire court. 442 F.2d at 181. Others who considered it important filed amici curiae briefs: NAACP Legal Defenses and Educational Fund, Inc., the National Office for Rights of the Indigent and the National Conference of Black Lawyers.

34 This term is employed by both the district court and the court of appeals to signify what is commonly referred to as solitary confinement. 442 F.2d at 182.

35 ". . . nor [may] cruel and unusual punishments [be] inflicted." U.S. CONST. amend. VIII.